UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 212

Docket No. PH-1221-07-0017-W-1

Ronald A. Davis,

Appellant,

v.

Department of Defense,

Agency.

September 10, 2007

Ronald A. Davis, Baltimore, Maryland, pro se.

Robert E. Golinski, Esquire, Indianapolis, Indiana, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision dismissing his appeal for lack of jurisdiction. We DENY the petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant is a GS-5 Teller with the Defense Finance and Accounting Service, Defense Military Pay Office, Fort Meade, Maryland. Initial Appeal File

(IAF), Tab 4, Subtab 4b. In an August 19, 2005 complaint to the Office of Special Counsel (OSC), the appellant alleged that his supervisor committed several prohibited personnel practices, including giving him a lower performance rating and not promoting him because he failed to perform a task that would have required him to violate law and regulations and refusing to promote him in retaliation for filing a grievance concerning his performance rating. *See Davis v. Department of Defense*, 103 M.S.P.R. 516, ¶¶ 2, 11 (2006). The August 19, 2005 complaint to OSC constituted the first disclosure made by the appellant relevant to this appeal. After OSC terminated its investigation, the appellant appealed to the Board, but in a February 17, 2006 initial decision, an administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant's performance appraisal and non-selection for a promotion were not appealable adverse actions and that the appellant could not bring an individual right of action (IRA) appeal under 5 U.S.C. § 1221(a) because the appellant failed to show that he exhausted his remedies with OSC by raising a claim of reprisal for whistleblowing before OSC. *Davis v. Department of Defense*, MSPB Docket No. PH-3443-06-0056-I-1, slip op. at 3-4, 7 (Initial Decision, Feb. 17, 2006); *see Davis*, 103 M.S.P.R. 516, ¶ 4. In a September 27, 2006 Opinion and Order, the Board denied the appellant's petition for review for failure to meet the criteria for review, but reopened the appeal on its own motion and affirmed the initial decision as modified. *Davis*, 103 M.S.P.R. 516, ¶ 1. The Board agreed with the administrative judge that the appellant failed to raise allegations of reprisal for whistleblowing with OSC and, therefore, the appellant failed to exhaust his remedies with OSC as required by 5 U.S.C. § 1214(a)(3). *Id.*, ¶ 12.

¶3 After issuance of the February 17, 2006 initial decision, the appellant made a new filing with OSC and specifically alleged reprisal for whistleblowing. IAF, Tab 7, Exhibit 1. According to the appellant, OSC did not respond to this

complaint, and on October 3, 2006, he filed an IRA appeal with the Board.[1] IAF, Tab 1 at 2-3. The administrative judge issued a show-cause order on the issue of Board jurisdiction in which, inter alia, she advised the appellant that it was unclear whether his OSC complaint encompassed the same personnel actions raised in his Board appeal and whether his complaint to OSC alleged reprisal for protected disclosures. IAF, Tab 5 at 3. The administrative judge ordered the appellant to, among other things, "identify his allegedly protected disclosures, the date and to whom they were made, [and] indicate how the disclosures are covered by 5 U.S.C. § 2302(b)(8)." *Id*.

¶4 In response to the administrative judge's order, the appellant referred to his August 19, 2005 complaint to OSC, which is summarized above, and essentially reiterated the personnel actions set forth in that complaint with the addition of an allegation that his supervisor denied him a cash award. IAF, Tab 7 at 3-5. The appellant provided a copy of his March 6, 2006 OSC complaint in which he complained that OSC did not process his August 19, 2005 complaint as an allegation of reprisal for whistleblowing. *Id*., Exhibit 1. In his March 6, 2006 complaint, the appellant alleged that his disclosures in his August 19, 2005 complaint evidenced an abuse of authority and a violation of law, rule, or regulation. *Id*.

¶5 After receipt of the parties' submissions regarding the jurisdictional issue, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 13. The administrative judge found that the appellant failed to establish that he had a reasonable belief that his disclosures evidenced an abuse of authority and therefore they were not protected. *Id*. at 6-7. The administrative judge found in

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[1] The appellant also asserted that on March 3, 2006, he requested OSC to reconsider its action in his first complaint, including a request that it consider the complaint under 5 U.S.C. § 2302(b)(8). IAF, Tab 1 at 3. According to the appellant, OSC responded to his letter on March 7, 2006, stating that it had reviewed the appellant's submission and would not change its previous decision. *Id*.

the alternative that the appellant could not show that his disclosures were a contributing factor in a personnel action because of the timing of the actions and his disclosures. *Id*. at 7-8.

¶6 On petition for review, the appellant complains that documents from his previous appeal and submission to OSC were not incorporated into the record of this appeal and that the administrative judge erroneously used the date he filed his second OSC complaint instead of the date of his first complaint in adjudicating the appeal. Petition for Review File (PFRF), Tab 1 at 2. The appellant also complains that the administrative judge failed to provide him with proper notice of the elements necessary to establish an abuse of authority, erred in her analysis of whether he established an abuse of authority, failed to consider his contention that his disclosures evidenced a violation of law, rule, or regulation, and erred in her contributing factor analysis. *Id*. at 2-4. The agency has filed a response opposing the petition for review. PFRF, Tab 3.

ANALYSIS

¶7 We deny the petition for review as the appellant has not presented any new and material evidence or shown that the initial decision was based upon an erroneous interpretation of statute or regulation that affects the outcome of the appeal. *See* 5 C.F.R. § 1201.115(d). We reopen the appeal on the Board's own motion under 5 C.F.R. § 1201.118, however, to modify the administrative judge's jurisdictional analysis, still dismissing the appeal for lack of jurisdiction.

¶8 The Board has jurisdiction over an IRA appeal, such as the instant case, if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Azbill v. Department of Homeland Security*, 105 M.S.P.R. 363, ¶ 13 (2007); Rusin v.

Department of the Treasury, 92 M.S.P.R. 298, ¶ 12 (2002). To satisfy the contributing factor jurisdictional criterion, an appellant need only raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure tended to affect the personnel action in any way. *Azbill*, 105 M.S.P.R. 363, ¶ 14. An appellant may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id.*

¶9 As mentioned above, the appellant complains on review that documents from his first appeal were not considered by the administrative judge in adjudicating the instant case.2 PFRF, Tab 1 at 2. Without finding that the administrative judge erred in not incorporating the documents into the record of this appeal, we have considered the appellant's alleged disclosures and the personnel actions raised in his previous Board appeal in an effort to more fully understand the appellant's contentions in the instant appeal.

¶10 The appellant maintains that he disclosed an abuse of authority and a violation of law, rule, or regulation in his filings with OSC and that the administrative judge erred in her adjudication of whether the disclosures were

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[2] Based on the appellant's argument on review, it appears that he interpreted the standard instruction in the February 17, 2006 initial decision not to resubmit documents already in the record when filing a petition for review as meaning that he should not submit documents in the record in one appeal when filing a new appeal. *See* PFRF, Tab 1 at 2; MSPB Docket No. PH-3443-06-0056-I-1, Initial Decision, slip op. at 10. The appellant asserted below that the record in his previous Board appeal was part of the record in the instant case. *See, e.g.*, IAF, Tab 7 at 3, Tab 12 at 2. At no point, however, did he specifically request that the record be incorporated, and the administrative judge never took such an action. To the extent that the administrative judge may have erred by neither incorporating the record from the appellant's previous appeal nor informing him that he needed to resubmit documents that are in the record in his first appeal, any potential error is cured by our consideration of the relevant contentions from the appellant's first appeal.

protected under the Whistleblower Protection Act. PFRF, Tab 1 at 2-4. We need not address whether the administrative judge erred as alleged by the appellant because, as discussed below, assuming that the appellant's filings constituted protected disclosures, the appellant still failed to make nonfrivolous allegations that his disclosures were a contributing factor in a personnel action. For the reasons set forth below, we also need not address the appellant's argument on review that the contributing factor element is met when a protected disclosure played any part in the personnel action complained about.

¶11 Regarding the appellant's performance appraisal, the administrative judge found that the appellant acknowledged that, at the time of the disclosure made in his August 19, 2005 OSC complaint, his supervisor had already completed the challenged performance rating. IAF, Tab 13 at 7, Tab 7 at 3. That finding is supported by the copy of the appellant's appraisal in the record, which was signed by the appellant's supervisor and the appellant on May 25, 2005. IAF, Tab 4, Subtab 4j at 2. With regard to the selection of another individual for the position, the record contains a referral list on which the appellant's supervisor indicated his selection. IAF, Tab 4, Subtab 4i. That document is signed and dated August 10, 2005. *Id*. While the appellant suggests on review that a handwritten notation on the referral list dated October 31, 2005, shows that the selection was not made until that time, PFRF, Tab 1 at 3, this argument is inconsistent with the appellant's contention below that his supervisor announced the selection on September 1, 2005, IAF, Tab 7 at 7. Based on a review of the uncontradicted evidence below, nothing causes us to question that the selection was made on August 10, 2005.3

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[3] In his petition for review, the appellant complains that the selection date is a disputed fact and that he was not allowed discovery to attempt to establish that the selection was made on October 31, 2005. PFRF, Tab 1 at 3. Contrary to the appellant's assertion, there is not a serious question regarding the date his supervisor made the selection and the administrative judge did not err by not allowing discovery on this issue. *See Markland v. Office of Personnel Management*, 73 M.S.P.R. 349, 353 (1997) (an

¶12 Because the personnel actions complained about by the appellant predate his protected disclosures, there is no way that the disclosures could have in any way contributed to the personnel actions complained about by the appellant. *See Orr v. Department of the Treasury*, 83 M.S.P.R. 117, ¶ 15 (1999), aff'd, 232 F.3d 912 (Fed. Cir. 2000) (Table); *Finston v. Health Care Financing Administration*, 83 M.S.P.R. 100, ¶ 5 (1999); *see also Horton v. Department of the Navy*, 66 F.3d 279, 283-84 (Fed. Cir. 1995) (finding that a protected disclosure that occurred the day after the initiation of a proposed removal could not have been a contributing factor in the personnel action). The appellant has not offered any evidence or made a nonfrivolous allegation which would warrant a contrary conclusion.

¶13 Finally, with regard to the appellant's claim that he was denied some sort of cash award between June and August 2005,4 the appellant has never fully explained this claim. See IAF, Tab 1 at 3, Tab 7, Exhibit 1 at 4. Based on the lack of specificity in the appellant's claim, we find that the appellant has failed to nonfrivolously allege that his August 19, 2005 submission to OSC contributed to his not receiving a cash award. *See Rzucidlo v. Department of the Army*, 101 M.S.P.R. 616, ¶ 17 (2006) (vague and conclusory allegations of wrongdoing by others do not constitute a nonfrivolous allegation of a protected disclosure); *McCorcle v. Department of Agriculture*, 98 M.S.P.R. 363, ¶ 21 (2005)

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administrative judge has broad discretion on discovery matters, and absent an abuse of discretion the Board will not find reversible error), *aff'd*, 140 F.3d 1031 (Fed. Cir. 1998).

[4] In his Board appeal, the appellant stated that he was denied a cash award between May and October 2005, IAF, Tab 1 at 3, but in assessing the appellant's whistleblowing claim, the Board is bound by an appellant's statements to OSC, *see Davis*, 103 M.S.P.R. 516, ¶ 10; *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 94 (2001), *review dismissed*, 32 F. App'x 543 (Fed. Cir. 2002); *see also Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993) (the test of the sufficiency of an employee's charges of whistleblowing to OSC is the statement that he makes in the complaint requesting corrective action, not his post hoc characterization of those statements).

(conclusory allegations lacking in specificity do not constitute nonfrivolous allegations of IRA jurisdiction).

¶14 Because the appellant has failed to make a nonfrivolous allegation that his disclosures, even assuming that they were protected disclosures under the law, were a contributing factor in one of the personnel actions he complained about, he has failed to establish Board jurisdiction over his appeal. Therefore, the administrative judge properly dismissed the appeal.

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.